

Testimony of David B. Rivkin, Jr.  
before the House National Security Subcommittee  
September 19, 2006

The British success in disrupting a plot to attack numerous airplanes over the Atlantic has been much celebrated. The question of what enabled Britain's success has also been extensively discussed and has not been particularly disputed. By comparison, the question of what lessons we can draw from the British experience, considering the considerable differences between the U.S. and U.K. anti-terrorism institutions and legal regimes, has been more controversial. This is a question, however, very much worth answering.

In doing so, we should begin with the proposition that the United States and Britain share the same common law heritage, with its emphasis on individual rights and limitations on state power, and many of same basic political values. That said, British law, political culture and sensibilities are far more attuned to the practical needs of preventing terrorist attacks than their American counterparts. It is also the case that while both Britain and the U.S. face common threats from Islamist terrorism, the particulars of these threats differ in some notable respects. Some specific examples of the key differences and similarities between the U.S. and British anti-terrorism-related systems include the following:

*Nature of the Threat:* Both the U.S. and U.K. figure prominently on the list of targets drawn by various radical Islamist groups. In both cases, the threat of attack comes in part from individuals who have traveled to Britain or the U.K. – the September

11 attack is the most prominent example of an attack carried out exclusively by foreign personnel – and in part, from radicalized individuals residing in Britain and the United States. It is difficult to draw generalizations in this area, but it certainly appears that the British Muslim community in Britain is more radicalized and feels more alienated from the mainstream of the British society, thereby presenting a more fertile ground for terrorist recruiting, than is the case in the United States. The 2005 London subway bombings are an example of the terrorist attack carried out largely by home-grown terrorists. And while the current investigation into the particulars of the airline bomb plot is still continuing, it also appears to be largely planned by British nationals. By contrast, the U.S. Muslim community is certainly better integrated into the American society, most of its mainstream representatives have vigorously condemned terrorism and the terrorist threat to the U.S. appears to be largely driven by foreign entities and personnel.

However, one can make too much of these differences. I particularly do not agree with the notion, advanced by some observers, that British attacks are largely driven by the domestic factors, e.g., poverty in the British Muslim community, sense of anger at the alleged discrimination emanating from the mainstream of the British society, or another factor favored by many pundits – anger about British participation in the wars in Afghanistan and Iraq. It is impossible to decouple the activities of Jihadi organizations in the Middle East from the activities of even ostensibly home-grown terrorist cells. To put it differently, activities by al Qaeda, Taliban, Iraq-based Jihadists, or even the exploits of Hezbollah and Hamas serve as a source of inspiration and technical expertise even to those British or American terrorists who have never traveled

to the Middle East or met an al Qaeda recruiter. In my view, the global war against terror is truly seamless.

*Criminal Investigations:* British law enforcement officials clearly have a more robust ability to investigate suspected terrorist activity than do U.S. police agencies. This is true in a range of areas. For example, traditionally there has been much more direct cooperation between British intelligence and police services; there was never the sort of “wall” between foreign intelligence and law enforcement functions that the United States maintained before September 11. Similarly, British officials need not meet the very strict requirement of “probable cause” to obtain warrants that U.S. investigative bodies must satisfy under the Bill of Rights. (In Britain, a warrant can generally issue on a showing of “reasonable suspicion.”)

In addition, the British police have certain extraordinary tools designed specifically to fight terrorism, such as “control orders” issued by the Home Secretary which not only allow the police to monitor terror suspects, but which may control the travel, daily routine and contacts of such individuals. These orders also enable law enforcement authorities to identify more easily the overall pool of potential terror operatives, since the close supervision of some suspects requires their undiscovered colleagues to assume more active roles.

*Profiling:* Ironically, although today’s Britain leans far more to the left than does the United States, British attitudes towards ethnic and religious profiling appear to be far more pragmatic. In the United States, the very idea of profiling – even as a means of allocating and concentrating scarce investigative or surveillance resources—is highly controversial, virtually taboo. By contrast, in Britain, law enforcement and intelligence

officials clearly target their resources on the communities most likely to produce terror recruits, and further on the most radicalized segments of those communities. They are also able directly to infiltrate extremist Mosques, community centers and Islamist gatherings, instead of relying almost entirely on informants as is the case with the FBI. In this regard, even today the FBI feels that there must be some evidence of a criminal “predicate,” before it can assign agents to cover even public events.

*Privacy:* Although the British virtually invented the notion of personal privacy – the saying “an Englishman’s home is his castle” can be traced at least to the 16<sup>th</sup> century – the concept is not as broadly defined in law or politics as in contemporary America. Not only have the courts created broad rights to privacy, above and beyond the Fourth Amendment’s requirements, but our society has progressed to a point where individuals are considered by some to have a “privacy” interest in what can only be described as public actions – such as giving personal information to third parties who are not bound by any formal privacy agreement or participating in widely used fora like the Internet. Indeed, judging by some of the more extreme criticism levelled against war on terror policies, there are those who consider as the purest tyranny any compromise of individual autonomy to meet the community’s needs.

*Secrecy:* Similarly, there is a substantial body of opinion in the United States which seems to consider *any* governmental effort to act secretly, or to punish the disclosure of sensitive information, to be illegitimate. Thus, for example, critics of the Bush Administration persistently attacked the President’s decision to have the National Security Agency (“NSA”) intercept al Qaeda’s international electronic communications without a warrant in part because of its secrecy, even though the relevant members of

Congress had been informed of the NSA's program from the start. By contrast, there appears to be much less hostility in Britain towards government secrecy in general, and little or no tradition of "leaking" highly sensitive information as a regular part of bureaucratic infighting – perhaps because the perpetrators could far more easily be punished with criminal sanctions in the U.K. than under current U.S. law.

*Domestic/International Intelligence Cooperation:* The MI5, Scotland Yard, and MI6 cooperate reasonably well on terrorism-related issues and bureaucratic rivalries are far less pronounced than is the case in Washington. There is certainly no counterpart in the British experience to the virtual "war" that has been waged by portions of the CIA against the Bush Administration. Britain also takes a much more pragmatic attitude towards the necessity of cooperating with regimes, or their intelligence services, that have poor human rights records. This has periodically been an issue in both countries, and presents a difficult choice for any democracy. However, working with foreign intelligence services (like Pakistan's) with similar interests but questionable practices will continue to be a necessary part of the war on terror. This also means doing well militarily, since such regimes are highly sensitive to what they perceive to be Western staying power and ability to take the fight to al Qaeda and its allies.

*Experience:* There is, of course, no substitute for experience and there is no doubt that Britain benefits (if that is the right word) from its experience in fighting IRA terror. Although the IRA was arguably a less dangerous threat than al Qaeda and its allies, if only because the IRA eventually concluded that minimizing civilian casualties was in its political interests, it was nevertheless well-organized, ideologically committed and vicious. For thirty years, Britain's military and law enforcement forces investigated,

infiltrated, surveilled and openly fought the IRA and won, deriving two important advantages in the process. First, Britain's armed forces and police have been thoroughly schooled in the most advanced techniques of surveillance and counter-terrorism. Second, its political establishment and population (obviously, with some exceptions) have become accustomed to the measures, sometimes intrusive and burdensome, necessary to prevent terrorist attacks.

*The Relevant Lessons.* American anti-terror and intelligence capabilities have, of course, improved substantially since September 11, and can boast a number of important successes in thwarting potential terror attacks, including important arrests in New York, Florida and Virginia. Moreover, the existence of the NSA and SWIFT surveillance and monitoring programs indicates that the Bush Administration, at least, is fully aware of the intelligence imperatives presented by the Islamist threat. Further improvements, however, are both possible and necessary and the British counter-terrorism successes offer instructive lessons.

The United States cannot, of course, adopt all aspects of the British system; our constitutional systems are really quite different. One perfect example of these differences is in the area of free speech. Given the existence of the First Amendment and the case law which construes it, it would be both impossible and undesirable to try to replicate the U.K. Official Secrets Act in this country. However, we can clearly adopt at least some aspects of the British counter-terrorism system.

For me, the key lessons to emulate and the areas for improvement are not primarily about passing new laws or restructuring the existing bureaucratic institutions. I am, of course, aware of the continuing criticism of our existing counter-terrorism

organizations, and particularly, of the FBI. It is not particularly surprising that the FBI, which traditionally has been a law enforcement entity, has not developed a bureaucratic culture capable of focusing on counter-terrorism operations with the level of clarity and intensity achieved by Britain's MI-5. And, in the ideal world, if we could create an MI-5-type entity in the United States, and leave the FBI to deal with all of the remaining law enforcement responsibilities, we would be better off. However, realism is an essential virtue in statecraft and, in my view, trying to break up the FBI and to create an MI-5-type entity in this country would be so disruptive and difficult – politically, legally and bureaucratically – that it is probably not worth trying.

What should be more doable, although I do not kid myself into believing that it would be easy, is to change our current legal and political culture in the areas of privacy and secrecy. To emphasize, I am not suggesting that we need to alter in any way our constitutional traditions or even pass new laws. However, we can and should accord the government greater investigative latitude and accept some compromise of privacy in exchange for a greater security. We should be able to have a serious discussion about different profiling techniques. Indeed, at the very least, we should launch a serious national debate on how to balance individual liberty and public safety. Bush Administration critics often misquote Benjamin Franklin as having said that “those who would trade liberty for security deserve neither.” What Franklin actually proposed was a balancing test: “They that would give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.” In fighting terrorism, the British appear to have been striking that balance successfully and our balance is still less than perfect.